APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-300

THOMAS L. ANDREWS,
Petitioner,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED
August 28, 1971

CERTIORARI GRANTED
November 16, 1971

CIVIL DOCKET
UNITED STATES DISTRICT COURT

C. Form No. 102A Rev.

CLOSED

Jury demand date:
4-30-69 by defts

2652

3

TITLE OF CASE	ATTORNEYS
THOMAS L. ANDREWS vs LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD	For plaintiff: Wall & Campbell [illegible] (Amy Estes) [illegible] Eighth Floor, Standard Bldg. [illegible] St., N. W. Atlanta, Ga. 30303 577-6100 For defendant: Heyman & Sizemore 310 Fulton Federal Bldg. Atlanta, Ga. 30303 Webb, Parker, Young & Ferguson Robert G. Young 927 Fulton Federal Bldg. Atlanta, Ga.

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed 4-28-69	Clerk	$15 00	[illegible]	Robert G. Young [illegible]	15 00	
			APR 3 0 1969	Treas.U.S. Dep. 9		15 00
J.S. 6 mailed 4-7-70	Marshal		MAY 4 1970	Alfred Young Atty	5 00	
Basis of Action:	Docket fee	5 00	MAY 7 1970	Treas.U.S.Dep.		5 00
Petition for Removal. (Action for reinstatement of job)			JUL 7 1970	Andrews Estes [illegible]	5 00	
	Witness fees		JUL 9 1970	Treas.U.S.Dep.		5 00
Action arose at:	Depositions					

ATTEST: A TRUE COPY.
CERTIFIED THIS AUG 4 1970
Claude L. Goza, Clerk
By: Deputy Clerk

JURY TRIAL DEMANDED

CLOSED 12652

DATE	PROCEEDINGS	Date Order or Judgment Noted
1969		
Apr. 28	3 Petition for removal from Superior Court of Fulton County, Ga., -with transcript of record including ANSWER, MOTION TO DISMISS, & BRIEF IN SUPPORT OF MOTION TO DISMISS; notice of removal, certificate of service, & $250 removal bond filed.	jar
30	4 Defts' DEMAND FOR JURY TRIAL, filed.	mjw
1970		
Feb. 5	SUBMITTED ON DEFTS. MOTION TO DISMISS.	rms
Apr. 7	29 Order filed granting defts.' motion to dismiss.	
	31 JUDGMENT filed & entered for defts, & against pltf. - defts. to recover costs of action from pltf.	
	Copy of order & judgment to counsel.	mjw
May 4	32 Pltf's. notice of appeal from the judgment on decision by the Court dated 4-7-70, filed. (cc to U.S.C.A. & counsel for deft.)	jms
	34 Pltf's. motion for reconsideration and brief in support thereof, filed.	"
6	$250.00 cost bond on appeal filed.	hds
18	SUBMITTED ON PLTF'S. MOTION FOR RECONSIDERATION.	pwm
June 11	37 Order filed denying pltf's. motion for reconsideration as to first and second grounds, but granting same as to third ground, subject to rt. of pltf. within 15 days hereof to amend pleadings, etc. (Copy to counsel)	rms
10	42 Pltf's notice of appeal to the U.S.C.A., filed. Copy defts & U.S.C.A. (Bond filed 5-6-70)	jar

I N D E X

SUPREME COURT OF THE UNITED STATES

TERM, 1970

No. 71-300

THOMAS L. ANDREWS,

Petitioner,

-v-

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

THOMAS L. ANDREWS,

Plaintiff

CIVIL ACTION
NO. 12652

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD,

(Filed: August 28, 1969)

Defendants

PETITION FOR REMOVAL

To the Judges of the United States District Court for the Northern District of Georgia:

The petition of Louisville and Nashville Railroad Company and Seaboard Coast Line Railroad Company respectfully shows:

1.

On the 2nd day of April 1969, the plaintiff filed a complaint against the defendants in the Superior Court of the County of Fulton, State of Georgia which was served upon the defendants on April 8, 1969, said case being entitled "Thomas L. Andrews, Plaintiff, v. Louisville and Nashville Railroad Company and Seaboard Coastline Railroad Company, as Lessees of the Properties known as The Georgia

Railroad, Defendants," Docket No. B-44859. To said petition defendants filed their answer and motion to dismiss together with a brief in support of said motion and a copy of the plaintiff's petition and the said answer, motion and brief of the defendants are annexed hereto.

2.

The above described action is one of which this Court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which may be removed to this Court by the petitioners, defendants herein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand and No/100 Dollars ($10,000.00), exclusive of interest and costs, and is between citizens of different states.

3.

The plaintiff, Thomas L. Andrews, at the time this action is commenced was and still is a citizen of the State of Georgia and the defendant, Louisville and Nashville Railroad Company, at the time this action is commenced was and still is a corporation incorporated under the laws of the State of Kentucky with its principal place of business in the State of Kentucky and was not and is not a citizen of the State of Georgia wherein this action was brought. The defendant, Seaboard Coast Line Railroad Company, at the time this action is commenced was and still is a corporation incorporated under the laws of the State of Virginia with its principal place of business in the State of Virginia and was not and is

not a citizen of the State of Georgia wherein this action was brought.

4.

Petitioner files herewith a bond with good and sufficient surety under the provisions of Title 28 United States Code, Section 1446(d) conditioned that they will pay all costs and disbursements incurred by reason of the removal procedures hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, petitioners pray that the above action now pending against them in the Superior Court of the County of Fulton, State of Georgia, be removed therefrom to this Court.

s/ Robert G. Young

s/ Heyman and Sizeman
ATTORNEYS FOR PETITIONERS

Robert G. Young
Heyman and Sizemore
310 Fulton Federal Building
Atlanta, Georgia 30303

- - - - -

STATE OF GEORGIA

COUNTY OF FULTON

Personally appeared before me, the undersigned officer duly authorized to administer oaths, ROBERT C. YOUNG, who, being duly sworn, says that he is Of Counsel for Louisville and Nashville Railroad Company and Seaboard Coast Line Railroad Company in the

above and foregoing proceeding, that he has read the Petition for Removal and that the allegations therein made are true to the best of his knowledge, information and belief.

s/Robert G. Young

Sworn to and subscribed before me, this 28 day of April, 1969.

s/ Jackie C. Summers
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Feb. 28, 1971.

...oOo...

NOTE: Portion of Record Omitted, Filed In Its Original Form

* * * * *

...oOo...

IN THE SUPERIOR COURT OF THE COUNTY OF FULTON
STATE OF GEORGIA

THOMAS L. ANDREWS,

BOOK 2397 PAGE 194

Plaintiff

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD,

CASE NO. B-44859

Defendants

COMPLAINT

Comes now the Plaintiff before the Court to show that it has been damaged at the hands of the Defendants named herein all contrary to the law and in particulars according to the following facts:

1.

The Defendants named herein are corporations authorized to do business in this state under the laws of the State of Georgia, having their principal places of business in Fulton County and thereby are subject to the jurisdiction of this Court.

2.

The Defendants are in the business of operating railroads and railroad properties in the State of Georgia and elsewhere, and in carrying out this business they do hire and

retain the services of numerous employees who work a forty (40) hour regular week under specified conditions and with a stipulated schedule of benefits.

3.

That the Plaintiff in this action was an employee in good standing during the month of September 1967, and had been for many years prior thereto.

4.

That on or about the 30th of September, 1967, the Plaintiff was involved in an automobile wreck which necessitated that he be given medical care. That a great part of this medical care consisted of a neck operation involving several discs, two of which had to be fused together. That on or about the 18th March, 1968 he was pronounced cured and fit to return to work and dismissed from active medical care.

5.

That on or about the 3rd May, 1968, he was examined medically and pronounced fully recovered and capable of returning to the duties to which he had formally been assigned by his employer The Georgia Railroad Company.

6.

That the Plaintiff was then and is now fully recovered and capable of returning to work to continue his employment as formerly.

7.

That the Georgia Railroad Company has

consistently refused to allow the Plaintiff herein to return to work, giving as its sole reason that the Plaintiff is not now and never will be recovered sufficiently to perform his former duties with the Railroad Company.

8.

That the Railroad Company has stubbornly refused to heed the medical advice of expert medical doctors who state that the Plaintiff is fully recovered and capable of performing his duties as formerly. That the Railroad Company has consistently refused to permit the Plaintiff herein to return to work so that he may earn his living and support his family as formerly and as the other employees in good standing are permitted to do.

9.

That the Defendant Railroad has caused the Plaintiff to hire an attorney to enforce his rights to work for a living, merely because of the stubbornness of the Defendant Railroad in forcing this issue to litigation without cause. That Defendant Railroad has not even conducted a full medical examination of the Plaintiff's situation, but has arbitrarily and with a litigious attitude refused any consideration to the Plaintiff herein, thereby purposefully causing, without a shadow of right, the filing of this law suit.

10.

That the Defendant Railroad Company has wrongfully discharged your petitioner, That this wrongful discharge has cost the loss of earnings in the form of wages that would have been earned as of the 18th of March, 1968

up to and including the date of filing of this petition.

11.

That Plaintiff has been deprived of the expectancy of future earnings from the Railroad Company up until the date of his scheduled retirement, all according to contract, which amounts to a future expectancy of approximately ten (10) years.

WHEREFORE, Petitioner prays for judgment in this Court against the Defendant Railroad Company in the amount of Eight Thousand Ninety Six Dollars and Eighty Five Cents ($8,096.85) for loss of past earnings, being the current damages on the cause due to the wrongful discharge Plaintiff, and for One Hundred Thousand Dollars ($100,000.00) for loss of future earnings of which Plaintiff will be deprived in the same cause. Plaintiff also prays for attorneys fees for the bringing of this action in this Court, to be for the use of his attorney in the amount of Twenty Five Thousand Dollars ($25,000.00).

Respectfully submitted,

WALL & CAMPBELL

s/ John H. Howkins,
John H. Howkins,
Attorney

805 Standard Federal Building
Atlanta, Georgia 30303

523-8626

GEORGIA, Fulton County, Clerk's Office
Superior Court
Filed for Record 2 day of April 1969
Recorded APR 10 1968 19___

s/ (illegible) Clerk

...oOo...

ANSWER

(Number and title omitted) (Filed:

FIRST DEFENSE: Plaintiff's petition fails to set forth a claim against defendants upon which relief can be granted.

SECOND DEFENSE: Plaintiff is not entitled to recover in this action because he has not pursued the grievance procedures available to him under the contract between certain crafts and classes of employees and the Georgia Railroad which governs the rights of the plaintiff and has further failed to resort to or exhaust the administrative remedies available to him under the Railway Labor Act.

THIRD DEFENSE: Plaintiff is not entitled to recover in this action as the contract between certain crafts and classes of employees and the Georgia Railroad which governs the rights of the plaintiff does not provide any remedy or right for him to recover wages by reason of his being disqualified for employment because of a physical condition.

FOURTH DEFENSE: Defendants deny the allegations of paragraph 1, of the plaintiff's petition; defendants admit the allegations of paragraph 2. of the plaintiff's petition; defendants admit the allegations of paragraph 3. of the plaintiff's petition; answering

paragraph 4., defendants admit the allegations contained in the first two sentences and deny the allegations contained in the last sentence in said paragraph; defendants deny the allegations of paragraphs 5., 6., 7., 8., 9., and 10. of plaintiff's petition; answering paragraph 11., defendants deny the allegations of the same and state that plaintiff is still an employee of Georgia Railroad, temporarily disqualified because of his physical condition; that his seniority and all other rights are being preserved, and if and when his condition permits, based on medical examination by company doctors, he will be allowed to return to duty with all employment rights unimpaired; defendants state that they are not indebted to plaintiff in any sum whatsoever.

s/Robert G. Young

s/ Heyman and Sizemore
ATTORNEYS FOR DEFENDANTS

Robert G. Young
Heyman and Sizemore
310 Fulton Federal Building
Atlanta, Georgia 30303

521-2268

MOTION TO DISMISS

(Number and title omitted) (Filed:

The defendants move the court as follows:

1.

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2.

That plaintiff is not entitled to recover in this action because he fails to show that he has pursued any grievance procedures available to him under the contract between certain crafts and classes of employees of which he is a part and the Georgia Railroad which, of necessity, must govern the rights of the plaintiff and has further failed to show that he has exhausted the administrative remedies avail to him under the Railway Labor Act.

s/ Robert G. Young

s/ Heyman and Sizemore

Robert G. Young
Heyman and Sizemore
310 Fulton Federal Building
Atlanta, Georgia 30303
521-2268

..oOo...

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Number and title omitted) (Filed: April 7, 1970)

O R D E R

In this suit for wrongful discharge from employment defendant railroad companies have moved to dismiss, alleging that plaintiff has failed to meet the federal jurisdictional requirement that he exhaust his administrative remedies before the National Railroad Adjustment Board, under 45 U.S.C. §153 First (i). Defendants are correct and, therefore, the petition must be dismissed.

Plaintiff filed a complaint in the Superior Court of Fulton County, Georgia, alleging that he was wrongfully discharged by the defendants, as lessees of the properties known as the Georgia Railroad. The case was removed to this court, and plaintiff has not objected to removal.

In the case of Walker v. Southern Ry. Co., 385 U.S. 196, 17 L.Ed. 2d 294 (1966), the United States Supreme Court stated, in pertinent part:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 US 30, 1 L ed 2d 622, 17 S Ct 635.

385 U.S. at 198, 17 L.Ed.2d at 297. Plaintiff cannot maintain his action for damages, because his complaint does not allege that he has exhausted his remedy before the National Railroad Adjustment Board. O'Mara v. Erie Lackawanna Railroad Co., 407 F.2d 674 (2nd Cir. 1969).

Therefore, the complaint is hereby dismissed.

So ordered this the 3rd day of April, 1970.

s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

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JUDGMENT ON DECISION BY THE COURT

(Number and title omitted) (Filed: April 7, 1970)

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as THE GEORGIA RAILROAD, recover of the plaintiff THOMAS L. ANDREWS, their costs of action.

Dated at Atlanta, Georgia, this 7th day of April, 1970.

CLAUDE L. GOZA
Clerk of Court

BY: s/ Mary J. Watson
Deputy Clerk

Filed & entered in Clerk's Office
this 7th day of April, 1970.
CLAUDE L. GOZA, CLERK DC

BY: s/ Mary J. Watson
Deputy Clerk

...oOo...

NOTICE OF APPEAL TO THE COURT OF APPEALS UNDER RULE 73(b)

(Number and title omitted) (Filed: May 4, 1970

Notice is hereby given that THOMAS L. ANDREWS, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment on decision by the Court dated and entered April 7, 1970:

> "This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr. United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,
>
> It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COAST-LINE RAILROAD COMPANY, as Lessees of the Properties known as the GEORGIA RAILROAD, recover of the plaintiff THOMAS L. ANDREWS, their costs of action."

Dated at Atlanta, Georgia, this 7th day of April, 1970"

WALL & CAMPBELL

s/ John H. Howkins
Attorneys for Appellant

Eighth Floor, Standard Bldg.
95 Fairlie Street, N.W.
Atlanta, Ga. 30303
577-6100

...oOo...

MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT THEREOF

(Number and title omitted) (Filed:May 4, 1970)

Comes now the plaintiff in the above styled matter and moves the Court to reconsider its Order and Judgment on decision by the Court dated and entered on April 7, 1970, on the following grounds:

1.

The Court has misconstrued the decision in the case of Walker v. Southern Railway Co., 385 U.S. 196, 17 L. Ed. 2d 294 (1966), in that while the Court in its Order refers to headnote 1, which states that parties are compelled to arbitrate before the National Railroad Adjustment Board, it nonetheless failed to consider headnote 2, which states in part as follows:

> "A discharged employee may bring an action for damages in a state court without first exhausting administrative remedies provided in the Railway Labor Act; . . ."

2.

Also, the Court in dismissing the instant case on the pleadings as it were is not properly construing the Federal Rules of Civil Procedure which first of all requires that pleadings only give "notice" and not spell out claims in the same detail that was required under the old common law pleadings.

Specifically, the Court's attention is called to Federal Rule 9(c) which relates to pleading the occurrence of conditions precedent. Interpretation of this section demands that the Court not dismiss an action for

failure to allege a condition precedent. The most that could be done would be to require, under a Motion for More Definite Statement or other appropriate motion, that the plaintiff allege what has occurred under the Railway Labor Act. In this connection see Sidebotham v. Robson, 216 F. 2d 816, and for cases so holding the Court's attention is called to Lada v. Wilkie, 250 F. 2d 211; U.S. v. Standard Oil Co. of California, 7 F.R.D. 338.

It has been held many times that a complaint cannot be dismissed for failure to state a claim unless it appears with certainty that no state of facts (emphasis supplied) could be proven upon which relief can be granted. Connelly v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80.

3.

The case cited in the Court's Order, O'Mara v. Erie Lackawanna Railroad Co., at 407 F. 2d at page 674, has been appealed to the United States Supreme Court and there a Writ of Certiorari was granted and a decision entered February 24, 1970. It is cited at 25 L.Ed 2d 21, 397 U.S. 25. Of particular significance is headnote 2 of the decision, which again relates to the fact that a dismissed employee's petition should not be summarily dismissed:

> "Where the courts are called upon to fulfil their role as the primary guardians of a labor union's duty of fair representation to employees, complaints by employees should be construed to avoid dismissals, and employees at the very least should be given the opportunity to file supplemental pleadings unless it appears beyond doubt that the cannot state a good cause of

action."

WHEREFORE, the plaintiff prays that the Court reconsider its Judgment heretofore entered and reinstate the plaintiff's claim as prayed.

This 4th day of May, 1970.

Respectfully submitted,

WALL & CAMPBELL

s/ John H. Howkins
Attorneys for Plaintiff

Eighth Floor, Standard Building
95 Fairlie Street, N.W.
Atlanta, Georgia 30303
577-6100

...oOo...

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AS TO FIRST AND SECOND GROUNDS, BUT GRANTING SAME AS TO THIRD GROUND

(Number and title omitted) (Filed: June 11, 1970)

This is a suit for wrongful discharge against the Georgia Railroad Company. It was filed on April 2, 1969. On April 28, 1969, defendants removed the case from the Superior Court of Fulton County, Georgia, to this court, alleging diversity jurisdiction. On the same day, defendants filed their answer and a motion to dismiss. Both as a defense and as basis for dismissal, defendants alleged that plaintiff had not exhausted his administrative remedies under the Railway

Labor Act. Plaintiff did not respond to defendants' motion in any way. On April 3, 1970, this court dismissed plaintiff's complaint, on the ground that he had not exhausted his remedy before the National Railroad Adjustment Board. Plaintiff filed a notice of appeal to the Fifth Circuit from the court's order dismissing his complaint. Simultaneously, he filed a motion for reconsideration in this court. It is this motion for reconsideration which the court presently considers.

In essence, the plaintiff asserts that the exhaustion of administrative remedies provided in the Railway Labor Act is not a jurisdictional prerequisite to a suit in the state court for damages for allegedly wrongful discharge. To support its contention, it quotes headnote 2 from the case of Walker v. Southern Ry. Co., 385 U.S. 196, 17 L.Ed. 2d 294 (1966), which states, in pertinent part:

> A discharged railroad employee may bring an action for damages in a state court without first exhausting administrative remedies provided in the Railway Labor Act.....

385 U.S. at 196, 17 L.Ed. 2d at 295. In the Walker case, the Supreme Court, in a per curiam decision, adverted to a line of cases, exemplified by Moore v. Illinois Central Railroad Co., 312 U.S. 630, 85 L.Ed. 1089 (1941), which had permitted the filing of a state suit for damages for wrongful discharge, without previously exhausting administrative remedies under the Railway Labor Act. The Court then raised the question whether it would overrule this line of cases, referring to its dictum in Republic Steel Corp. v. Maddox, 379 U.S. 650, 13 L.Ed. 2d 580 (1965), to the

effect that the Court expressly did not there overrule Moore, but awaited consideration of overruling it until a proper case was presented. The Court then made the following statement, which this court quoted in its former order dismissing plaintiff's complaint.

> Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act.

385 U.S. at 198, 17 L.Ed.2d at 297. However, because of "considerable dissatisfaction" with the operations of the National Railroad Adjustment Board, as a result of which Congress had enacted Public Law 89-456, 80 Stat. 208, effective June 20, 1966, "drastically" revising the procedures of the National Railroad Adjustment Board, the court held that it would not overrule the Moore line of cases. For this reason, the headnote quoted by plaintiff is misleading, in the context of this case. The headnote states as a broad general proposition a holding which was limited to a factual situation involving procedural "defects" in the Railway Labor Act prior to the amendments of June 20, 1966. Thus, if plaintiff seeks to establish that the exhaustion of administrative remedies is not a prerequisite to his action before this court, he is incorrect. The dissent of Justice Harlan, joined by Justices Stewart and White, clearly establishes the rule that administrative remedies should be exhausted before resort to the courts, as do both the Maddox case and the case of Czosek v. O'Mara, ____U.S.____,25 L.Ed.2d 21, 24 (1970),

affirming O'Mara v. Erie Lackawanna Railroad Co., 407 F.2d 674 (2nd Cir. 1969). Therefore, plaintiff's motion for reconsideration is denied as to his first ground.

In his second ground, plaintiff points to Fed. R.Civ. P. 9(c), which states, with regard to the pleading of conditions precedent:

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

In this connection, plaintiff's complaint nowhere asserts that he has complied with all conditions precedent. Both defendants' answer and motion to dismiss set out the denial of performance of conditions precedent "specifically and with particularity" as required by Rule 9(c). Even in his motion for reconsideration, plaintiff has not alleged that he has exhausted his remedies before the National Railroad Adjustment Board, despite the fact that his motion is filed over 13 months after the filing of his complaint and the answer and motion to dismiss of the defendants. For these reasons, plaintiff's argument that this court should not dismiss an action for failure to allege a condition precedent is insubstantial. Not only has plaintiff failed to allege the condition precedent, he has not so much as suggested that he has satisfied such a condition. Therefore, the plaintiff's motion is denied as to his second ground.

In his third ground, plaintiff replows his second ground. He points to the case of

Czosek v. O'Mara, supra, which affirmed the case cited by this court in its earlier order, i.e., O'Mara v. Erie Lackawanna Railroad Co., supra, and quotes to the court from a headnote which preceeds that opinion in the reporter. The headnote is taken from the decision of the Supreme Court, 25 L.Ed.2d at 24, and is basically a quotation from the opinion of the Court of Appeals, 407 F.2d at 679, which was affirmed. In the Czosek case, the district court had dismissed the complaint against the railroad for failure to exhaust administrative remedies under the Railway Labor Act, analogous to the facts at bar. On appeal, the Court of Appeals for the Second Circuit reversed the decision of the district court, with respect to the union defendants, but affirmed the dismissal of the complaint against the railroad, with the condition that plaintiffs were to be allowed leave to amend their complaint to allege that the employer was somehow implicated in the union's alleged breach of duty of fair representation. This cause of action against the union does not require the exhaustion of administrative remedies before resort to the courts. Glover v. St. Louis-San Francisco Railroad Co., 393 U.S. 324 21 L.Ed.2d 519 (1969). The leave given to the plaintiffs in that case was given to establish involvement of the employer in the union's discrimination against the plaintiff, not to allow them to establish that they had exhausted their administrative remedies.

However, to avoid any possible suggestion of prejudice in this case, the court hereby grants plaintiff's motion to remand to the following extent. The granting of defendants' motion to dismiss hereby is made subject to the right of plaintiff, within fifteen (15) days from the date of entry of this order, to amend his pleadings to demonstrate

that he has exhausted his administrative remedies under the Railway Labor Act. It will not be adequate for him merely to assert that he has satisfied all conditions precedent to the filing of suit, because defendant already specifically has denied that this particular condition precedent has been satisfied. Therefore, his allegation must be specific and to the point, ie. that he has exhausted his remedies before the National Railroad Adjustment Board.

In summary, plaintiff's motion for reconsideration is granted to the extent indicated in this order.

So ordered this the 10 day of June, 1970.

s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

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NOTICE OF APPEAL TO THE
COURT OF APPEALS UNDER RULE 73(b)

(Number and title omitted) (Filed June 30, 1970)

Notice is hereby given that THOMAS L. ANDREWS, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgement on decision by the Court dated and entered June 10, 1970.

ORDER

This is a suit for wrongful discharge against the Georgia Railroad

Company. It was filed on April 2, 1969. On April 28, 1969, defendants removed the case from the Superior Court of Fulton County, Georgia, to this court, alleging diversity jurisdiction. On the same day, defendants filed their answer and a motion to dismiss. Both as a defense and as basis for dismissal, defendants alleged that plaintiff had not exhausted his administrative remedies under the Railway Labor Act. Plaintiff did not respond to defendants' motion in any way. On April 3, 1970, this court dismissed plaintiff's complaint, on the ground that he had not exhausted his remedy before the National Railroad Adjustment Board. Plaintiff filed a notice of appeal to the Fifth Circuit from the court's order dismissing his complaint. Simultaneously, he filed a motion for reconsideration in this court. It is this motion for reconsideration which the court presently considers.

In essence, the plaintiff asserts that the exhaustion of administrative remedies provided in the Railway Labor Act is not a jurisdictional prerequisite to a suit in the state court for damages for allegedly wrongful discharge. To support its contention, it quotes headnote 2 from the case of Walker vs. Southern Ry. Co., 385 U.S. 196, 17 L.Ed. 2nd 294 (1966), which states, in pertinent part:

> A discharged railroad employee may bring an action for

> damages in a state court without first exhausting administrative remedies provided in the Railway Labor Act.....

385 U.S. at 196, 17 L.Ed.2d. at 295. In the Walker case, the Supreme Court, in a per curiam decision, adverted to a line of cases, exemplified by Moore vs. Illinois Central Railroad Co., 312 U.S. 630, 85 L.Ed. 1089 (1941), which had permitted the filing of a state suit for damages for wrongful discharge, without previously exhausting administrative remedies under the Railway Labor Act. The Court then raised the question whether it would overrule this line of cases, referring to its dictum in Republic Steel Corp. v. Maddox, 379 U.S. 650, 13 L.Ed.2d 580 (1965) to the effect that the Court expressly did not there overrule Moore, but awaited consideration of overruling it until a proper case was presented. The Court then made the following statement, which this court quoted in its former order dismissing plaintiff's complaint.

> Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act.

385 at 198, 17 L.Ed. 2d at 297. However, because of "considerable dissatisfaction" with the operations of the National Railroad Adjustment Board, as a result of which Congress had enacted Public Law 89-456, 80 Stat. 208, effective June 20, 1966, "drastically" revising the procedures of the National Railroad Adjustment Board, the court held that it would not overrule the Moore line of cases. For this reason, the headnote quoted by plaintiff is misleading, in the context of this case. The headnote states as a broad general proposition a holding which was limited to a factual situation involving procedural "defects" in the Railway Labor Act prior to the amendments of June 20, 1966. Thus, if plaintiff seeks to establish that the exhaustion of administrative remedies is not a prerequisite to his action before this court, he is incorrect. The dissent of Justice Harlan, joined by Justices Stewart and White, clearly establishes the rule that administrative remedies should be exhausted before resort to the courts, as do both the Maddox case and the case of Czosek vs. O'Mara, ____ U.S. ____, 25 L.Ed.2d 21, 24 (1970), affirming O'Mara vs. Erie Lackawanna Railroad Co., 407 F.2d. 674 (2nd Cir. 1969). Therefore, plaintiff's motion for reconsideration is denied as to his first ground.

In his second ground, plaintiff points to Fed. R. Civ. P. 9(c), which states, with regard to the

pleadings of conditions precedent:

> In pleading the performance of occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

In this connection, plaintiff's complaint nowhere asserts that he has complied with all conditions precedent. Both defendants' answer and motion to dismiss set out the denial of performance of conditions precedent "specifically and with particularity" as required by Rule 9(c). Even in his motion for reconsideration, plaintiff has not alleged that he has exhausted his remedies before the National Railroad Adjustment Board, despite the fact that his motion is filed over 13 months after the filing of his complaint and the answer answer and motion to dismiss of the defendants. For these reasons, plaintiff's argument that this court should not dismiss an action for failure to allege a condition precedent is insubstantial. Not only has plaintiff failed to allege the condition precedent, he has not so much as suggested that he has satisfied such a condition. Therefore, the plaintiff's motion is denied as to his second ground.

In his third ground, plaintiff

replows his second ground. He points to the case of Czosek vs. O'Mara, supra, which affirmed the case cited by this court in its earlier order, i.e., O'Mara vs. Erie Lackawanna Railroad Co., supra, and quotes to the court from a headnote which preceeds that opinion in the reporter. The headnote is taken from the decision of the Supreme Court, 25 L.Ed.2d at 24, and is basically a quotation from the opinion of the Court of Appeals, 407 F.2d at 679, which was affirmed. In the Czosek case, the district court had dismissed the complaint against the railroad for failure to exhaust administrative remedies under the railroad Labor Act, analogous to the facts at bar. On appeal, the Court of Appeals for the Second Circuit reversed the decision of the district court, with respect to the union defendants, but affirmed the dismissal of the complaint against the railroad, with the condition that plaintiffs were to be allowed leave to amend their complaint to allege that the employer was somehow implicated in the union's alleged breach of duty of fair representation. This cause of action against the union does not require the exhaustion of administrative remedies before resort to the courts. Glover vs. St. Louis-San Francisco Railroad, Co., 393 U.S. 324 21 L.Ed.2d 519 (1969). The leave given to the plaintiffs in that case was given to establish involvement of the employer in the

union's discrimination against the plaintiff, not to allow them to establish that they had exhausted their administrative remedies.

However, to avoid any possible suggestion of prejudice in this case, the court hereby grants plaintiff's motion to remand to the following extent. The granting of defendants' motion to dismiss hereby is made subject to the right of plaintiff, within fifteen (15) days from the date of entry of this order, to amend his pleadings to demonstrate that he has exhausted his administrative remedies under the Railway Labor Act. It will not be adequate for him merely to assert that he has satisfied all conditions precedent to the filing of suit, because defendant already specifically has denied that this particular condition precedent has been satisfied. Therefore, his allegation must be specific and to the point, i.e., that he has exhausted his rememdies before the National Railroad Adjustment Board.

In summary, plaintiff's motion for reconsideration is granted to the extent indicated in this order.

So ordered this the 10 day of June, 1970.

s/ Albert J. Henerson, Jr.
Judge, United States District Court
for the Northern District of Georgia

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NOTE: Portion of Record Omitted, Filed In Its Original Form

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS L. ANDREWS,

Appellant

vs. CASE NO. _____

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COAST LINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Appellee

Appeal from a Judgement
Of the United States District Court
For the Northern District of Georgia,
Atlanta, Georgia

BRIEF FOR THOMAS L. ANDREWS

I.

STATEMENT OF THE CASE

This is an appeal by Thomas L. Andrews, Plaintiff, in the United States District Court, Northern District of Georgia, from a Judgement rendered June 10, 1970. The Plaintiff brought this action in the Superior Court of Fulton County, Georgia, seeking to recover damages from the Defendant for wrongful discharge.

The cause was removed to the United States District Court for the Northern District of Georgia, Atlanta Division, by the Defendant.

Defendant moved to dismiss the Complaint on the ground that Plaintiff had failed to exhaust his administrative remedies. The Honorable Albert J. Henderson, Jr., Judge, ordered the Complaint dismissed April 3, 1970, and Judgement was entered April 7, 1970; however Plaintiff's motion for Reconsideration was granted, and on June 10, 1970, the Judge passed an order permitting Plaintiff to amend his complaint to allege that he had exhausted his administrative remedies. The plaintiff cannot do so, and appeals from that Order. The Motion to Dismiss was based solely on a question of law.

II.

QUESTIONS PRESENTED

(1) Must a discharged (or status equivalent thereto) employee of a Railroad Company exhaust his administrative remedies as a prerequisite to maintaining an action for wrongful discharge under a common-law-theory seeking damages?

III.

STATEMENT OF FACTS

No evidence has been presented, and there has been no discovery in this case by either party. The issues are therefore limited to the scope of the pleadings in the complaint and answer. Plaintiff alleges that he was employed by defendant when injured by a third party, necessitating a medical furlough, that plaintiff was examined medically and pronounced fit to return to work, but that defendant failed and refused to take plaintiff off medical furlough status. In substance, defendant denies these allegations.

IV.

ARGUMENT

The question of whether a discharged employee of a railroad may accept a railroad's conduct as wrongful discharge and seek a common-law remedy through litigation without exhausting administrative remedies is a prerequisite to litigation has been litigated frequently with many apparently inconsistent decisions.[1]

The early cases on the issue show that a discharged employee pursuing common law remedies for wrongful discharge is an exception to the general rule that exhaustion of administrative remedies is a prerequisite to litigation as the Plaintiff is no longer a party

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1. Moore vs. Illinois Central Railway Company, 312 U.S. 630, 61 Sup.Ct. 754, 85 L.Ed. 1089, (1940), Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup.Ct. 577, 94 L.Ed. 795 (1949), Lee vs. Virginia Railway Co., 89 Se 2nd 28 (1955), Walker vs. Southern Railway Company, 385, U.S. 196 17 L.ed. 2nd 294 87 S Ct 365, reh den 385 U.S. 1020, 17, L ed 2d 559, 87 S Ct 699 (1966), Republic Steel Corp. vs. Maddox 379 U.S. 650, 13 L ed 2nd 580 (1965), Cales vs. Chesapeake & Ohio Railway Co., 300 F. Supp 155 (1969), W. K. Ferguson vs. Seaboard Air Line Railroad Co., 400 F 2nd 473 (1968), Florida East Coast Railway vs. Hill, 233 So 2d 845, (D.C. Fla. 1970), O'Mara vs. Erie Lackawanna Railroad Co., at 407 F. 2d. at page 674.

to the Agreement may sue as any other injured Plaintiff might.[2]

In Moore vs. Illinois Central Railway Company, 312 U.S. 630, 61 Sup. Ct. 754, 85 L. Ed. 1089 (1940) the Court specifically found that nothing in the Act (48 Stat 1186, ch 691, §2, 45 USCA §151a, FCA title 45, §151a, USCA 94 L ed 799) took away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in Court. "But we find nothing in that Act to take away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in Court."[3] The 1966 amendments (Public Law 89-456, 80 Stat 208) to the Act have in no way changed the Act to deprive the Courts of jurisdiction. The case of Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup. Ct. 577, 94 L. Ed. 795

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2. Moore vs. Illinois Central Railway Company, 312 U.S. 630 61 Sup. Ct. 754, 85 L. Ed. 1089 (1940), Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup. Ct. 577, 94 L. Ed 795 (1949), Lee vs. Virginia Railway Co., 89 SE 2nd 28 (1955).

3. Moore vs. Illinois Central Railway Company, 312 U.S. 630 61 Sup. Ct. 754, 85 L.Ed. 1089, (1940), (at page 634 U.S. and page 1092 L.ed.)

(1949), also holds that the Railway Labor Act does not bar Courts from adjudicating such cases. "A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."[4] Again, Appellant points out that the 1966 amendments (Public Law 89-456, 80 Stat 208), while streamlining administrative procedures neither deprives the Court of jurisdiction nor changes the Board's scope of authority.

Of course where a Plaintiff seeks by way of common law relief what the Board had jurisdiction of anyway, namely, severance pay of SIX HUNDRED NINETY-FOUR DOLLARS AND EIGHT CENTS ($694.08), the National Railroad Adjustment Board will take original jurisdiction.[5] Since the 1966 amendments (Public Law 89-456, 80 Stat 208) various Federal Courts have ruled on the issue, reflecting the failure of the 1966 amendments to change either the scope or jurisdiction of the Board and the failure of the 1966 amendments to deprive Federal Courts of jurisdiction of this matter.[6]

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4. Slocum vs. Delaware, L. & W. Railroad Company, 339 U.S. 239, 70 Sup. Ct. 577, 94 L.Ed. 795 (1949).

5. Republic Steel Corp. vs. Maddox, 379 U.S. 650 13 L. ed. 2nd 580, (1965).

6. Cales vs. Chesapeake & Ohio Railway Co., 300 F. Supp 155 (1969).

In Cales vs. Chesapeake & Ohio Railway Co., 300 F. Supp. 155 (1969), the 1969 decision held that a discharged railroad employee who alleged a common law wrongful discharge action was not required to exhaust his administrative remedies under the Act. W. K. Ferguson vs. Seaboard Air Line Railroad Co. 400 F. 2d 473 (1968) held that if and only if state law (not the Railroad Labor Act) required exhaustion of remedies, the wrongfully discharged employee would be required to exhaust administrative remedies as a prerequisite to civil litigation. A 1970 case, Florida East Coast Railway vs. Hill, 233 So. 2d 845 (D. C. Fla. 1970), most specifically holds that remedies available even under the 1966 amendments (Public Law 89-456, 80 Stat 208) to the Act are not the exclusive remedy whereby an allegedly wrongfully discharged employee may determine his rights. In this case, the Court specifically emphasized that while this alleged occurrence happened before the 1966 amendments (Public Law 89-456, 80 Stat 208) even if the amendments (Public Law 89-456, 80 Stat 208) were retroactive their decision would be the same; the 1966 amendments (Public Law 89-456, 80 Stat 208) to the National Railroad Labor Act did not deprive Courts of their jurisdiction and did not modify, alter, or extend the scope, authority or jurisdiction of the Board.

Roy Walker vs. Southern Railway Company, 385 U.S. 196 17 L. ed. 2nd 294 (1966), occasionally viewed as an exception to the rule that exhaustion of administrative remedies is a prerequisite to litigation is in fact one of the recent landmark decisions upholding the very rule that "a discharged employee may bring an action for damages in a State Court without first exhausting administrative

remedies provided in the Railway Labor Act ....."[7]. The rationale of the Walker decision was that the Railway Labor Act administrative remedies were unfair to employees and oppressively cumbersome. The Court even implied that because of the changes future cases might hold that the Railway Labor Act amendments of 1966 (Public Law 89-456, 80 Stat 208, 1966) had increased the scope authority or jurisdiction of the Board to hear common law claims for wrongfully discharged employees to the exclusion of the Federal Courts. However, not one single case so holds; and numerous cases as cited above continue consistently to hold that despite the 1966 amendments (Public Law 89-456, 80 Stat 208, 1966) courts have not been deprived jurisdiction of common law remedies for wrongfully discharged claimants. The case cited in the Lower Court's Order, O'Mara vs. Erie Lackawanna Railroad Co., at 407 F. 2d., page 674 (1969), affirmed the dismissal of Plaintiff's complaint for failure to allege exhaustion of administrative remedies, and the court went on to explain, however, that

> "Where the courts are called upon to fulfill their role as the primary guardians of a labor union's duty of fair representation to employees, complaints by employees

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7. Walker vs. Southern Railway Company, 385 U.S. 196, 17 L ed 2nd 294 87 S Ct. 365 reh den 385 U.S. 1020, 17 L ed 2d 559 87 S Ct 699 (1966).

> should be construed to avoid dismissals, and employees at the very least should be given the opportunity to file supplemental pleadings unless it appears beyond doubt that they cannot state a good cause of action."

It should be most especially noted that the O'Mara case meticulously avoids overruling any of the numerous cases positively holding that the discharged employee is not required to exhaust administrative remedies as a prerequisite to litigation.

The Cales, Ferguson, Walker, Lee, Moore, Slocum, and Florida East Coast Railway cases are to be seen as historically supporting and upholding the right of a wrongfully discharged employee to seek his remedy through the courts without first exhausting his administrative remedies. These cases developed that principle; and the Walker case initiated the much needed procedural reforms of the Act; but the numerous cases above cited as the historical development of the law throughout thirty years reflect not one case that overrules the established principles that in common law remedy for wrongful discharge is an exception to the exhaustion of remedies doctrine for a discharged employee not seeking reinstallment or a performance of a past obligation. The only expression of a rule to the opposite is found in the minority dissenting opinions quoted by the District Court below.

V.

CONCLUSION

WHEREFORE, the common law being firm and sound that it is, and the failure of the 1966

amendments (Public Law 89-456, 80 Stat 208) to the act to enlarge the Board's jurisdiction or diminish that of the courts and the cases following that procedural amendment conclusively show that the well-recognized and well-reasoned exception yet prevails; remedies available even under the 1966 amendments (Public Law 89-456, 80 Stat 208) to the Railway Labor Act are not the exclusive remedy whereby an allegedly wrongfully discharged person may determine his rights.

W. ALFORD WALL

ANDREW W. ESTES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS L. ANDREWS,

Appellant,

V. CASE NO. 30307

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COAST LINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Appellee.

Appeal from a Judgment
Of the United States District Court
For the Northern District of Georgia,
Atlanta Division

BRIEF FOR APPELLEE

I.

STATEMENT OF ISSUE

The sole issue in this case is whether or not a discharged railroad employee aggrieved by the discharge may bring an action at law in an appropriate state court for money damages where such employee has failed to pursue his remedy under the administrative procedures established by his collective bargaining agreement subject to the Railway Labor Act and his right to review before the National Railroad Adjustment Board or a special board of adjustment under the 1966 Amendments to

the Railway Labor Act.

II.

STATEMENT OF FACTS

The Statement of Facts in the Brief of Appellant is accepted. Appellant states in Section I of his brief that he cannot amend to allege that he has exhausted his administrative remedies, although the court entered an order permitting him to do so.

III.

ARGUMENT

In the Brief of Appellant, reference is made to the right of the discharged employee to maintain an action under the common law. It should be pointed out that the common law rule is that in the absence of a contract or a controlling statute, the employer enjoys an absolute power of dismissing his employee without cause. 35 Am. Jur., Master and Servant, Sec. 26.

The employee in this case is subject to the Railway Labor Act. He, therefore, has a contract, negotiated by the representative of his craft or class of employment, which contract has grievance procedures available to him. This is required under the Act as set out in Title 45, Section 152, First, U.S.C.A.

Under the Railway Labor Act, Congress has provided an exclusive procedure for the settlement of so-called "minor disputes" -- those involving the interpretation or application of agreements concerning rates of pay, rules, or working conditions. Title 45, Section 153, First (i), U.S.C.A.

A discharge grievance such as the one the railroad employee has in the case at bar is clearly a dispute which comes within the above referred to section of the Act.

The Railway Labor Act further provides that such a dispute between an employee and a carrier shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such a dispute, but failing to reach an adjustment, the dispute may be referred by either party to the National Railway Adjustment Board. Title 45, Section 153, First (i), U.S.C.A. The award of such board is binding and may be enforced by the Federal District Court after appropriate action has been filed.

In 1966, Congress amended the Railway Labor Act, drastically revising procedures by which an employee could process his grievance. Special boards of adjustment are provided for and an agreement establishing such a board must be made within thirty (30) days from the date a request for one is made. Title 45, Section 153, Second, U.S.C.A. Under the new amendments, a provision is made for judicial review of a board decision if an employee loses. Title 45, Section 153, First (q), U.S.C.A.

In the report of the Senate Committee on Labor and Public Welfare, the purpose of the bill was stated as follows:

> "The principal purpose of the bill is to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board, to expedite disposition

> of grievances and disputes over the interpretation and application of agreements, and to provide equal opportunity for limited judicial review of awards of the Board to employees and employers."

U.S. Code, Congressional and Administrative News, Vol. 2, p. 2285, 89th Congress, 2nd Session, 1966.

The Federal rule is clear that employees must exhaust their administrative remedies before resorting to court action.

In the case of Republic Steel Corporation vs. Charlie Maddox, 379 U. S. 650, 85 S.Ct. 614, 13 L.Ed.2nd, 580, the employee sued in a state court for severance pay allegedly owed him under the terms of a collective bargaining agreement. In the state court, judgment was awarded in favor of the employee on the theory that state law applies to suits for severance pay since the employment relationship was ended and, further, under Alabama law, the employee was not required to exhaust the contract grievance procedures.

The Supreme Court reversed, holding that federal law requires the employee to resort to grievance procedures under his employment contract.

The Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer

and union as the mode of redress."

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation would 'inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'"

In the Maddox case, supra, the contract was subject to the Labor Management Relations Act and not the Railway Labor Act.

Under the Railway Labor Act, and prior to the Maddox decision, the Supreme Court had held that a trainman was not required by the Railway Labor Act to exhaust the administrative remedies granted him by the Act before bringing suit for wrongful discharge, provided the state courts recognized such a claim. Moore vs. Illinois Central Railroad Co., 312 U. S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941), and Transcontinental & Western Air, Inc. vs. Koppal, 345 U. S. 653, 73 S. Ct. 906, 97 L.Ed. 1325 (1953).

But, in the Maddox case, the Supreme Court said:

"Federal jurisdiction in both Moore and Koppal was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by Section 204 of the Railway Labor Act."

"Thus a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under Section 301(a) of the LMRA, has been removed."

The Fifth Circuit Court of Appeals has clearly stated the federal rule enunciated in the Maddox case. In the case of Boone vs. Armstrong Cork Company, 384 F. 2nd 285, the employee sued for alleged wrongful discharge in violation of a collective bargaining agreement. This Court held:

"If the collective bargaining agreement contemplates the use of a grievance procedure to protest a specific employer action, an employee may not sue for breach of contract on the basis of that action without first resorting to the procedure."

"Federal labor policy favors the use of grievance and arbitration

> procedures, and contractual provisions should be liberally interpreted so as to require resort to such procedures wherever a contrary result is not clearly indicated."

After the decision in the Maddox case, the question again came before the Supreme Court in the case of Roy Walker vs. Southern Railway Company, 385 U. S. 196, 87 S.Ct. 365, 17 L.Ed. 2nd, 294. The question raised in that case was whether or not the decisions in Moore vs. Illinois Central Railroad, supra, and Transcontinental & Western Air, Inc. vs. Koppal, supra, should be overruled in the light of the Maddox case.

The Court reiterated the rule in Maddox and stated that a discharge grievance was not a matter of voluntary agreement under the Railway Labor Act; that the parties were compelled to arbitrate their dispute before the National Railroad Adjustment Board established under the Act.

But the Court stated that at the time of the railroad employee's discharge in that case, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. The Court pointed out that railroad employees had had to wait as long as ten (10) years for a decision on their complaint.

The Court then said:

> "In consequence, Congress enacted. Public Law 89-456, 80 Stat. 208, effective June 20, 1966, which drastically revises

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CARD 2

> the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by Moore, Slocum, and Koppal. The contrast between the administrative remedy before us in Maddox and that available to petitioner persuades us that we would not overrule those decisions in his case."

Thus, the Court laid the ground rules for the future by clear implication. The Maddox decision did, in effect, vitiate the Moore and Koppal cases, but the Court would not expressly overrule the latter decisions until a case was presented where the employee had the benefit of the administrative remedies provided by the 1966 amendment to the Railway Labor Act.

So far, no such case has reached the Court. In the case at bar, the railroad employee clearly had the benefits of the amended statute. A most persuasive case on this subject, which is directly in point with the instant case, is the case of Beebe vs. Union Railroad Company, 208 Atl.2nd 16, decided by the Superior Court of Pennsylvania.

Other courts have pointed the way on this question.

In the case of Dominguez vs. National Airlines, Inc., 279 F.S. 392, S. D. New York, the employee sued for wrongful discharge and reinstatement, after being dissatisfied with the Railroad Adjustment Board's decision. The Court said:

> "In so holding, we are mindful that in two separate decisions, the Supreme Court has held that the Railway Labor Act does not bar actions for wrongful discharge predicated on state law for breach of an employment contract. However, as explained in Union Pacific R.R. vs. Price, 360 U. S. 60k, 620, 79 S. Ct. 1351, 3 L.Ed.2d 1460 (1959), those decisions were predicated on the old Railway Labor Act which did not provide for judicial review of a board decision if the employee lost. Whatever judicial remedies were otherwise available were therefore preserved. Since federal law was then thought not to apply to suits for wrongful discharge, one of the remedies was a suit in the state courts for damages for wrongful discharge. Since the decision in those cases, however, the law has changed. It is now clear that collective bargaining agreements under the Railway Labor Act are subject to federal substantive law."

The Seventh Circuit Court of Appeals, in the case of Slagley vs. Illinois Central Railroad Company, 397 F.2d. 546, made the following statement in a footnote to the decision:

> "...the Supreme Court limited this exception to common-law wrongful discharge cases in which the relief sought is damages rather than reinstatement. Even this exception may be short-lived. The Court's most recent reaffirmation of it apparently rested on the

inadequacies of the Adjustment Board procedure, specifically the delay inherent in it and the unavailability to the employee of judicial review of Board decisions. Walker vs. Southern R. Co., supra. The Court's language implied that if the recent amendments to the Railway Labor Act (P.L. 89-456 Sec. 1, 2, 80 Stat. 208) make the Board's remedies more effective even this limited exception to the exclusiveness of Board jurisdiction over minor disputes may be abandoned."

In the case of W. K. Ferguson, et al vs. Seaboard Air Line Railroad Company, 400 F. 2nd, 473, cited in Appellant's brief, the Court specifically pointed out that the railroad employee in that case did not have the benefit of the amended statute and, therefore, the rule in the Walker case, supra, would apply as to his remedies.

IV.

CONCLUSION

We think it is basic law that Congress has preempted the right of a state court or a federal court under diversity jurisdiction to determine this labor contract matter on

the merits. The trial court was correct in dismissing this action.

Respectfully submitted,

s/Robert G. Young
ROBERT G. YOUNG
WEBB, PARKER, YOUNG & FERGUSON

ATTORNEYS FOR APPELLEE

927 Fulton Federal Building
Atlanta, Georgia 30303

(404) 522-8841

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30307

THOMAS L. ANDREWS,
Plaintiff-Appellant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(April 26, 1971)

Before THORNBERRY and GODBOLD, Circuit Judges, and BOOTLE, District Judge.

BOOTLE, District Judge: This case is before us on appellant's appeal from the district court's granting of appellees' motion to dismiss based on appellant's having failed to meet the federal jurisdictional requirement that he exhaust his administrative remedies before the National Railroad Adjustment Board, under 45 U.S.C. § 153, First (i). Simultaneously with filing

his appeal to this court, appellant filed a motion for reconsideration in the court below. This motion was granted to the extent that appellant have 15 days within which to amend his pleadings to demonstrate that he had exhausted his administrative remedies under the Railway Labor Act. Appellant, in his brief, admits that he cannot make such a showing. The sole question presented for decision is whether or not a discharged railroad employee aggrieved by his discharge may bring a common law action for damages where he has failed to pursue his administrative remedies under the Railway Labor Act.

The Supreme Court held in *Moore v. Illinois Central R. Co.*, 312 U.S. 630, decided in 1941, and in *Transcontinental & West. Air v. Koppal*, 345 U.S. 653, decided in 1953, that a discharged employee of a carrier subject to the Railway Labor Act may accept the discharge as final and "proceed either in accordance with the administrative procedures prescribed in his employment contract (including referral of the dispute to the appropriate division of the Adjustment Board) or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law." *Transcontinental & West. Air. v. Koppal, supra* at 661. When *Moore* and *Koppal* were decided "federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 655 (1965). But "since that time the Court

has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists v. Central Airlines, Inc.* 372 US 682 . . . and by § 301(a) of the LMRA, *Textile Workers v. Lincoln Mills*, 353 US 448." *Republic Steel Corp. v. Maddox, supra* at 655. And "thus a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act . . . has been removed." *Republic Steel Corp. v. Maddox, supra* at 655.

Following the *Maddox* decision of 1965, the Supreme Court, in 1966, in *Walker v. Southern R. Co.*, 385 U.S. 196, took a further look at *Moore* and *Koppal* and posed to itself the question "whether those decisions should be overruled in light of *Maddox*." The Court answered that question thusly:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Brotherhood of Railroad Trainmen v Chicago River & Indiana R. Co. 353 US 30, 1 L ed 2d 622, 77 S Ct 635. Both at the time of petitioner's alleged discharge and at the time he brought his lawsuit, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. Congress initiated an inquiry and found that among other causes for dissatisfaction, 'railroad employees who have

grievances sometimes have to wait as long as 10 years or more before a decision is rendered [by the Board] on their claim'; for example, 'the First Division [which has jurisdiction over disputes involving yard service employees of petitioner's class] . . . has never been current in its work, [and has] a backlog of approximately 7 1/2 years . . . .' HR Rep No. 1114, 89th Cong. 1st Sess, at 3, 5; S Rep No. 1201, 89th Cong. 1st Sess, at 2. The Congress also found that 'if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained.' HR Rep, supra, at 15. S Rep, supra, at 3.

"In consequence, Congress enacted Public Law 89-456, 80 Stat 208, effective June 20, 1966, which drastically revises the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by Moore, Slocum and Koppal. The contrast between the administrative remedy before us in Maddox and that available to petitioner persuades us that we should not overrule those decisions in *his* case." (Emphasis supplied). *Walker v. Southern R. Co., supra* at 198.

Reverting once more to *Maddox*, we find footnote 14 too significant not to be quoted.

> "Be refusing to extend Moore v. Illinois Central R. Co. to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, e.g., the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." *Republic Steel Corp. v. Maddox, supra* at 658.

We conclude that whereas *Walker* did not present the case for which the Supreme Court was waiting in which to overrule *Moore* and *Koppal* in that plaintiff in that case had been precluded from benefiting by the 1966 Amendments to the Act (which Amendments significantly accelerated the procedures for obtaining action by and relief from the National Railroad Adjustment Board and provided for the first time entree directly to the District Courts of the United States for employees not prevailing before the Board), the case at bar is precisely the case for which the Supreme Court has been waiting in that there is no contention that the plaintiff here could not enjoy all the benefits of the 1966 Amendments.

Appellees urge that we should follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally such urging would be unnecessary, but here it must be unavailing. We agree with this comment by Mr. Justice Black in the sole dissent-

ing opinion in *Maddox:* "The Court recognizes the relevance of Moore and Koppal and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." Accordingly, the judgment appealed from is AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

PETITION FOR A WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

....., Term 1966 7/

No. 71-300

THOMAS L. ANDREWS,

Petitioner

v.

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES EDWARD SLATON
307 Southern Finance Building
Augusta, Georgia
Counsel for Petitioner

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IN THE

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No. .....

THOMAS L. ANDREWS,

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v.

LOUISVILLE & NASHVILLE RAILROAD CO., and SEABOARD COASTLINE RAILROAD CO., as Lessees of the Properties known as THE GEORGIA RAILROAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Thomas L. Andrews, prays that the Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on April 26, 1971 and the judgment on re-hearing rendered in the proceedings on June 1, 1971, which was an order denying the Petition for Re-hearing. No opinion was rendered in connection therewith.

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, unreported appears at Appendix A, *Infra*, page 6. The opinion of the United States Court of Appeals, as yet unreported, appears at Appendix B, *Infra*, pages 7-12. The United States

Court of Appeals denied the Petition for Re-hearing and no opinion was rendered thereon. The order denying the Petition for Re-hearing appears at Appendix C, *Infra*, page 13.

JURISDICTION

The final order of the United States Court of Appeals for the Fifth Circuit was entered on June 1, 1971. See Appendix C, *Infra*, page 13. This Petition for Certiorari was filed within ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USC, 1254 (1).

QUESTION PRESENTED

Must a discharged (or status equivalent thereto) union employee of a railroad company exhaust his administrative remedies under the Railway Labor Act as a prerequisite to maintaining an action for wrongful discharge under a common-law theory seeking damages.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

28 USC, § 1254 (1)
48 Stat 1186, Ch 691, § 2, 45 USCA § 151a, FCA
§ Title 45, § 151a, USCA 94 L. Ed. 799
Public Law 89-456, 80 Stat 208

STATEMENT OF THE CASE

The Petitioner brought this action in the Superior Court of Fulton County, Georgia seeking to recover damages from Respondent. The Petitioner alleged that while he was employed by Respondent, he was injured by a third party, necessitating a medical furlough; that Petitioner was subsequently medically examined and pronounced fit to return to work, but that Respondent failed and refused to remove Petitioner from medical furlough status, which action on the part of Respondent, Petitioner alleges constituted a wrongful discharge actionable at common law. Respondent denies these allegations.

Petitioner did not exhaust his administrative remedies.

The cause of the action was then removed to the United States District Court, Northern District of Georgia, Atlanta Division, by the Respondent, who then moved to dismiss the Complaint, on the grounds that Petitioner had failed to exhaust his administrative remedies.

Respondent's Motion to Dismiss on that ground was granted and an Order was entered against Petitioner on April 7, 1970. After Petitioner's Motion for Re-hearing was granted on June 10, 1970, the District Judge entered an order permitting Petitioner to amend his Complaint to allege that he had exhausted his administrative remedies, but he could not, as he had not exhausted his administrative remedies.

The case was appealed to the United States Court of Appeals for the Fifth Circuit, and on April 26, 1971 an opinion and order affirmed the judgment below. On June 1, 1971, the Motion for Re-hearing was denied in the United States Court of Appeals.

There was no evidence adduced prior to dismissal of Petitioner's petition. Therefore, the issues are limited to the scope of the pleadings.

REASONS FOR GRANTING THE WRIT

1) The case at Bar is precisely the case for which the Supreme Court has been waiting since 1966. The 1966 case was *Roy Walker vs Southern Railway*, 385 US 196, 17 L Ed 2d 294, 87 S Ct 365 REH DEN 385 U.S. 1020, 17 L Ed 2d 559, 87 S Ct 699 (1966) where the Court specifically found that nothing in the Act (48 Stat 1186, Ch 691, § 2, 45 USCA § 151a, FCA Title 45, § 151a, USCA 94 L Ed 799) made exhaustion of administrative remedies a prerequisite to filing a suit in Court. While the United States Supreme Court in that case speculated as to future cases by virtue of the 1966 amendments to the Act (Public Law 89-456, 80 Stat 208) nothing in the 1966 amendment took the right away and such

case presented since that time has been distinguished for other reasons. In the *Arguelles* case, this Court recognized that nothing in the amendments clearly took the right away.

2) **Federal Courts hold divergent views as to the issue at Bar.**

3) **The decision appealed from does not reflect existing law.** "Appellee urges that we should follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally, such urging would be unnecessary, but here it must be unavailing." (*Thomas L. Andrews vs L & N Railroad, et al*, Appendix B.)

4) **The United States Court of Appeals has misapprehended this Court's prior dictum and has failed to recognize the prevailing opinion of the majority of this Court.** (*U. S. Bulk Carriers, Inc. vs Dominic B. Arguelles*, ___US___, 27 L Ed 2d 456, 91 S Ct ___.) "In *Maddox*, there was no express exception governing individual claims of employees from § 301 Grievance Procedures and we decline to carve one out . . . the chronology of the two Statutes – § 596 and § 301 – makes clear that the judicial remedy was made explicit in § 596 and was not clearly taken away by § 301." p. 463. § 301 of the Act in question does not clearly take away the right to pursue the remedy of a worker through the common law, and the Supreme Court has refused to legislate that right away. Clearly, the Court of Appeals should not attempt to void that which the Supreme Court has been so very careful to preserve.

5) **Petitioner is entitled to the protection of existing law, notwithstanding the United States Court of Appeals premonitory ruling adopting Justice Black's former speculation.** "The Court recognizes the relevance of *Moore* and *Koppal*, and while declining expressly to overrule them in this case, has raised the overruling ax so high that its falling is just about as certain as the changing of the season". Rather, the Court of Appeals is bound by the right of Petitioner to pursue his common law remedy as by law is and has historically been provided.

CONCLUSION

For the reasons above outlined, A Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES EDWARD SLATON,
Attorney for Petitioner
307 Southern Finance Building
Augusta, Georgia 30902

ANDREW W. ESTES, Esq.
ALFORD WALL, Esq.
Co-Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

"This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr. United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendants LOUISVILLE AND NASHVILLE RAILROAD COMPANY and SEABOARD COASTLINE RAILROAD COMPANY, as Lessees of the Properties known as the GEORGIA RAILROAD, recover of the plaintiff THOMAS L. ANDREWS, their costs of action."

Dated at Atlanta, Georgia, this 7th day of April, 1970"

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30307

THOMAS L. ANDREWS,
Plaintiff-Appellant,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

(April 26, 1971)

Before THORNBERRY and GODBOLD, Circuit Judges, and BOOTLE, District Judge.

BOOTLE, District Judge: This case is before us on appellant's appeal from the district court's granting of appellees' motion to dismiss based on appellant's having failed to meet the federal jurisdictional requirement that he exhaust his administrative remedies before the National Railroad Adjustment Board, under 45 U.S.C. § 153, First (i). Simultaneously with filing

his appeal to this court, appellant filed a motion for reconsideration in the court below. This motion was granted to the extent that appellant have 15 days within which to amend his pleadings to demonstrate that he had exhausted his administrative remedies under the Railway Labor Act. Appellant, in his brief, admits that he cannot make such a showing. The sole question presented for decision is whether or not a discharged railroad employee aggrieved by his discharge may bring a common law action for damages where he has failed to pursue his administrative remedies under the Railway Labor Act.

The Supreme Court held in *Moore v. Illinois Central R. Co.*, 312 U.S. 630, decided in 1941, and in *Transcontinental & West. Air v. Koppal*, 345 U.S. 653, decided in 1953, that a discharged employee of a carrier subject to the Railway Labor Act may accept the discharge as final and "proceed either in accordance with the administrative procedures prescribed in his employment contract (including referral of the dispute to the appropriate division of the Adjustment Board) or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi law." *Transcontinental & West. Air, v. Koppal, supra* at 661. When *Moore* and *Koppal* were decided "federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 655 (1965). But "since that time the Court

has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists v. Central Airlines, Inc.* 372 US 682 . . . and by § 301(a) of the LMRA, *Textile Workers v. Lincoln Mills*, 353 US 448." *Republic Steel Corp. v. Maddox, supra* at 655. And "thus a major underpinning for the continued validity of the Moore case in the field of the Railway Labor Act . . . has been removed." *Republic Steel Corp. v. Maddox, supra* at 655.

Following the *Maddox* decision of 1965, the Supreme Court, in 1966, in *Walker v. Southern R. Co.*, 385 U.S. 196, took a further look at *Moore* and *Koppal* and posed to itself the question "whether those decisions should be overruled in light of *Maddox*." The Court answered that question thusly:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Brotherhood of Railroad Trainmen v Chicago River & Indiana R. Co. 353 US 30, 1 L ed 2d 622, 77 S Ct 635. Both at the time of petitioner's alleged discharge and at the time he brought his lawsuit, there was considerable dissatisfaction with the operations of the National Railroad Adjustment Board and with some of the statutory features. Congress initiated an inquiry and found that among other causes for dissatisfaction, 'railroad employees who have

grievances sometimes have to wait as long as 10 years or more before a decision is rendered [by the Board] on their claim'; for example, 'the First Division [which has jurisdiction over disputes involving yard service employees of petitioner's class] . . . has never been current in its work, [and has] a backlog of approximately 7 1/2 years . . . .' HR Rep No. 1114, 89th Cong. 1st Sess, at 3, 5; S Rep No. 1201, 89th Cong. 1st Sess, at 2. The Congress also found that 'if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained.' HR Rep, supra, at 15. S Rep, supra, at 3.

"In consequence, Congress enacted Public Law 89-456, 80 Stat 208, effective June 20, 1966, which drastically revises the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by Moore, Slocum and Koppal. The contrast between the administrative remedy before us in Maddox and that available to petitioner persuades us that we should not overrule those decisions in *his* case." (Emphasis supplied). *Walker v. Southern R. Co., supra* at 198.

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We conclude that whereas *Walker* did not present the case for which the Supreme Court was waiting in which to overrule *Moore* and *Koppal* in that plaintiff in that case had been precluded from benefiting by the 1966 Amendments to the Act (which Amendments significantly accelerated the procedures for obtaining action by and relief from the National Railroad Adjustment Board and provided for the first time entree directly to the District Courts of the United States for employees not prevailing before the Board), the case at bar is precisely the case for which the Supreme Court has been waiting in that there is no contention that the plaintiff here could not enjoy all the benefits of the 1966 Amendments.

Appellees urge that we should follow *Moore* and *Koppal* until they are actually overruled by the Supreme Court. Normally such urging would be unnecessary, but here it must be unavailing. We agree with this comment by Mr. Justice Black in the sole dissent-

ing opinion in *Maddox:* "The Court recognizes the relevance of Moore and Koppal and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." Accordingly, the judgment appealed from is AFFIRMED.

APPENDIX C

Re: No. 30307 – Andrews vs. Louisville & Nashville Railroad Co., et al

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Frances Wolff
Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that I have on the day below written served counsel for Respondent with the within and foregoing Petition for Certiorari by placing in the United States mail three (3) copies of same in a properly addressed envelope with adequate postage thereon addressed to Robert G. Young, Fulton Federal Building, Atlanta, Georgia.

This 26 day of August, 1971.

James Edward Slaton

JAMES EDWARD SLATON

307 Southern Finance Building
Augusta, Georgia 30902